

CHAPTER 5

DEPOSITIONS

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CHAPTER 5

DEPOSITIONS

I. INTRODUCTION.

A. What Is a Deposition?

1. A deposition is “[t]he testimony of a witness taken upon oral questions or written interrogatories . . . reduced to writing . . . and intended to be used in preparation and upon the trial of a civil action or criminal prosecution.” BLACK’S LAW DICTIONARY 440 (6th ed. 1990).
2. A deposition is a flexible, spontaneous, and dynamic discovery tool.

B. Reasons for Taking Depositions.

1. Trial/Hearing Preparation.
 - a. Depositions force you to start preparing your case.
 - b. Depositions give you direct, unfiltered access to the other party’s witnesses.
 - c. Depositions allow you to probe the other party’s position on key issues.
 - d. Depositions allow you to seek out additional evidence.
 - e. Depositions allow you to minimize the possibility of surprise testimony at the trial/hearing by exhausting the knowledge of the other party’s witnesses.

- f. Depositions allow you to gauge the skills, traits, and demeanor of the other party's witnesses.
 - g. Depositions allow you to secure admissions and "lock in" testimony.
- 2. Motion Practice. Depositions provide a factual record for motions.
- 3. Settlement.
 - a. Depositions force both sides to analyze the strengths and weaknesses of their case.
 - b. Depositions may narrow the issues in dispute.
 - c. Depositions may influence the other party by:
 - (1) Highlighting damaging or unflattering evidence; or
 - (2) Demonstrating the expense and emotional rigor of protracted litigation. See Time Contractors, J.V., DOT CBA Nos. 1669, 1691, 86-1 BCA ¶ 18,559 (refusing to allow the appellant to shift deposition costs to the government based on a "naked allegation of financial hardship").
- 4. Trial/Hearing.
 - a. Depositions preserve the testimony of witnesses who may not be able to appear at the trial/hearing because of age, illness, or distance.
 - b. Depositions provide a basis for contradicting or impeaching witnesses at the trial/hearing.

C. Additional Considerations.

1. Depositions are expensive and time consuming.
2. Friendly Witnesses. You should avoid deposing a friendly witness unless you need to preserve the witness's testimony.
3. Hostile Witnesses. If a hostile witness has already given you a detailed statement in the presence of a third party, you may not want to depose the witness.

II. RULES FOR CONDUCTING DEPOSITIONS IN CASES BEFORE THE U.S. COURT OF FEDERAL CLAIMS.

A. General Provisions Governing Discovery. FED. R. CIV. P. 26.

1. Methods of Discovery. FED. R. CIV. P. 26(a)(5). The parties may obtain discovery by oral or written depositions.
2. Discovery Scope and Limits. FED. R. CIV. P. 26(b).
 - a. The parties may discover any matter that is:
 - (1) Not privileged; and
 - (2) Relevant to the subject matter of the pending action.¹

¹ The information sought does not have to be admissible at the trial. It only has to be "reasonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1).

- b. The court may limit discovery if:
 - (1) The discovery sought is unreasonably cumulative or duplicative;
 - (2) The party seeking the discovery can obtain it from a more convenient, less burdensome, or less expensive source;
 - (3) The party seeking the discovery has had ample opportunity to obtain the information sought; or
 - (4) The burden or expense of the proposed discovery outweighs its likely benefit.
- 3. Protective Orders. FED. R. CIV. P. 26(c). The court in the district where a party plans to take a deposition may issue an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”
 - a. The party or a person from whom the discovery is sought must request the protective order.
 - b. The moving party must certify that he/she has attempted to resolve the dispute without court action.
 - c. The moving party must show “good cause.”
- 4. Timing and Sequence of Discovery. FED. R. CIV. P. 26(d).
 - a. The parties may not seek discovery from any source until they have met and conferred pursuant to Federal Rule of Civil Procedure (FRCP) 26(f).²

² A person may take a deposition before bringing an action in court under certain circumstances. See FED. R. CIV. P. 27(a).

- b. After the parties have met and conferred pursuant to FRCP 26(b), the parties may:
 - (1) Conduct discovery simultaneously; and
 - (2) Use any of the discovery methods available to them in any sequence.³
- 5. Supplementation of Responses. FED. R. CIV. P. 26(e). See W.M. Schlosser Co., Inc., ASBCA No. 44778, 96-2 BCA ¶ 28,587 (refusing to impose sanctions after finding no evidence that the government purposefully waited to the last permissible moment to inform the appellant that it intended to retain an expert witness).
- B. Persons Before Whom Depositions May Be Taken. FED. R. CIV. P. 28. See FED. R. CIV. P. 29 and FED. R. CIV. P. 30(b)(4).
 - 1. A party within the United States must take a deposition “before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held”
 - 2. A person who has a personal, professional, or financial interest in the action may not take a deposition.
- C. Stipulations Regarding Discovery Procedures. FED. R. CIV. P. 29. The parties may stipulate regarding:
 - 1. The person(s) before whom the parties will take depositions;
 - 2. The time and place where the parties may take depositions;
 - 3. Any required notice;

³ Upon motion, the court may dictate the sequence or order of the discovery. FED. R. CIV. P. 26(d).

4. The manner in which the parties may take depositions; and

5. The manner in which the parties may use depositions.

D. Depositions upon Oral Examination.⁴ FED. R. CIV. P. 30.

1. Who May a Party Depose? FED. R. CIV. P. 30(a).

a. As a general rule, a party may depose “any person.”

(1) “Corporate Rep Depo.” FED. R. CIV. P. 30(b)(6). An organization must designate person(s) to testify on its behalf, and if such person does not have personal knowledge of the matters set out in the deposition notice, the organization is obligated to prepare the designees so that they may give knowledgeable and binding answers. Dravo Corp. v. Liberty Mutual Insurance Co., 164 F.R.D. 70 (D.Neb.1995)

b. A party must obtain leave of the court, however, if:

(1) The party wants to depose a prisoner;

(2) The party wants to take more than 10 depositions;

(3) The party wants to depose a person who has already been deposed in the case; or

(4) The party wants to depose a person before the parties have met and conferred regarding a proposed discovery schedule.

⁴ A party can also take depositions upon written questions; however, this rarely occurs. FED. R. CIV. P. 31. See FED. R. CIV. P. 30(c).

2. Notice of Examination. FED. R. CIV. P. 30(b).

- a. The party seeking the deposition must give reasonable notice, in writing, to every other party to the action.

- b. The notice must state:
 - (1) The time and place where the party will take the deposition;
 - (2) The name and address of each person the party plans to depose;⁵ and
 - (3) The method the party plans to use to record the deponent's testimony (e.g., sound, sound-and-visual, stenographic means, etc.).⁶
 - c. The notice may include a request for the production of documents. FED. R. CIV. P. 30(b)(5).
3. Expenses. FED. R. CIV. P. 30(b)(2) and (g).
- a. The party taking the deposition must pay the cost of recording the deposition.
 - b. If the party that noticed the deposition fails to appear (or fails to subpoena the witness and the witness fails to appear), the court may order that party to pay the other party's reasonable expenses, including reasonable attorney's fees. See FED. R. CIV. P. 37(d).
4. Telephonic Depositions. FED. R. CIV. P. 30(b)(7). The parties may agree to take a deposition by telephone or other remote electronic means. See Time Contractors, J.V., supra (urging the parties to consider using telephonic depositions).

⁵ If the party does not know a deponent's name and address, the party must provide a general description that identifies the deponent or the class/group to which the deponent belongs. FED. R. CIV. P. 30(b)(1).

⁶ Another party may designate an additional method of recording the deponent's testimony, provided the party is willing to pay for it. FED. R. CIV. P. 30(b)(3).

5. Duration. FED. R. CIV. P. 26(d)(2). Local court rules may limit the time a deponent is “on the record” (e.g., seven hours in one full day).

6. Examination and Cross-Examination. FED. R. CIV. P. 30(c).
 - a. The witness must testify under oath.
 - b. Objections. See FED. R. CIV. P. 30(d)(1); FED. R. CIV. P. 32(d).
 - (1) The officer taking the deposition will note any objections on the record.
 - (2) A party must state its objections in a concise, non-argumentative, and non-suggestive manner.
 - (3) A party may only instruct a deponent not to answer to:
 - (a) Preserve a privilege;
 - (b) Enforce a court-ordered limitation; or
 - (c) Present a motion showing that the examination is being conducted:
 - (i) In bad faith; or
 - (ii) A manner calculated to unreasonably annoy, embarrass, or oppress the deponent.
 - (4) Subject to FRCP 28(b) and FRCP 32(d)(3), a party may object to the use of deposition testimony at a trial/hearing for the same reasons that the party could object if the witness was present and testifying.

- (a) A party will waive the following errors, irregularities, and objections unless the party raises them promptly:
 - (i) Errors and irregularities in the deposition notice;
 - (ii) Objections based on the qualifications of the officer before whom the party is taking the deposition; and
 - (iii) Errors or irregularities in the manner in which the testimony was transcribed, or the deposition prepared, signed, certified, sealed, indorsed, transmitted, or filed.
- (b) A party will waive the following errors, irregularities, and objections if a timely objection would have obviated, removed, or cured the error, irregularity, or grounds for objection:
 - (i) Objections based on the manner in which the deposition was taken;
 - (ii) Objections based on the form of the questions or answers;
 - (iii) Errors or irregularities in the oath or affirmation; and
 - (iv) Objections based on the conduct of the parties.

(c) A party will not waive the following objections unless a timely objection would have obviated or removed the grounds for objection:

(i) Objections based on the competency of the witness; or

(ii) Objections based on the competency, relevancy, or materiality of the testimony.

7. Review of Transcript by Witness. FED. R. CIV. P. 30(e).

a. If the deponent or a party requests the deponent to review the transcript, the deponent will have 30 days to do so.

b. The deponent may make changes; however, the deponent must sign a statement that details the deponent's reasons for making them.

E. Use of Depositions in Court Proceedings. FED. R. CIV. P. 32.

1. Any party may use a witness's deposition testimony to contradict or impeach the witness's in-court testimony.

2. An adverse party may use a party's deposition testimony for any purpose. See Ryan-Walsh, Inc. v. United States, 39 Fed. Cl. 305 (1997) (permitting the plaintiff to offer the depositions of the administrative contracting officer and the assistant contracting officer as substantive testimony at trial because they were party-opponent admissions); Weaver-Bailey Contractors, Inc. v. United States, 19 Cl. Ct. 474 (1990) (admitting the deposition testimony of two government employees over the government's "strenuous objections").

3. Any party may use a witness's deposition testimony for any purpose if the court finds that:
 - a. The witness is dead. See Ryan-Walsh, Inc. v. United States, 39 Fed. Cl. 305 (1997) (permitting the plaintiff to offer a deceased witness's deposition as substantive testimony at trial).
 - b. The witness is more than 100 miles from the place of the trial/hearing.
 - c. The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment. See International Gunnery Range Servs, Inc., ASBCA No. 34152, 90-1 BCA ¶ 22,601 (permitting the government to introduce the deposition testimony of a witness who had suffered a heart attack and was advised by his doctor not to testify at the hearing).
 - d. The party offering the deposition testimony could not procure the witness's attendance by subpoena.
 - e. Exceptional circumstances justify the use of the deposition testimony in the interest of justice. But see Ryan-Walsh, Inc. v. United States, 39 Fed. Cl. 305 (1997) (refusing to permit the plaintiff to offer depositions as substantive testimony based solely on cost, trial efficiency, or speculation that the government may not call the witness as planned).

F. Failure to Cooperate in Discovery. FED. R. CIV. P. 37.

1. Motions to Compel. FED. R. CIV. P. 37(a)(2).
 - a. If a deponent fails to answer a question during a deposition, the party asking the question may move for an order compelling an answer.

- (1) The moving party must certify that it has made a good faith effort to confer with the deponent—or the person responsible for the deponent’s failure to answer the question—in an attempt to resolve the situation without court action.
 - (2) The party asking the question may either complete or adjourn the deposition.
 - b. A party may treat an evasive or incomplete response as a failure to answer.
2. Expenses. FED. R. CIV. P. 37(a)(4).
- a. If the motion to compel is granted, the court may require the deponent—or the party responsible for the deponent’s failure to answer the question—to pay the moving party’s reasonable expenses, including attorney’s fees.
 - b. If the motion to compel is denied, the court may:
 - (1) Issue a protective order; and
 - (2) Require the moving party to pay the deponent’s—or the opposing party’s—reasonable expenses, including attorney’s fees.
 - c. If the motion to compel is granted in part and denied in part, the court may:
 - (1) Issue a protective order; and
 - (2) Apportion the parties’ reasonable expenses in a just manner.

3. Sanctions. FED. R. CIV. P. 37(b).
- a. Sanctions by Court in District Where Deposition Taken. FED. R. CIV. P. 37(b)(1). If a deponent fails to answer a question after being directed to do so by the court, the court may hold the deponent in contempt of court.
 - b. Sanctions by Court in Which Action Pending. FED. R. CIV. P. 37(b)(2). If a party fails to provide or permit discovery after being directed to do so, the court may take one or more of the following actions:
 - (1) Order that designated facts be taken as established for purposes of the action.
 - (2) Refuse to allow the disobedient party to support or oppose designated claims or defenses.
 - (3) Refuse to allow the disobedient party to introduce designated facts into evidence. See Thomas S. Rhoades and Steven L. Schluneger, ENG BCA Nos. 6025, 6062, 6097, 95-1 BCA ¶ 28,215 (refusing to permit Mr. Schluneger to testify at the hearing because of his failure to comply with a Board order to make himself available for an oral deposition).
 - (4) Strike pleadings in whole or in part.
 - (5) Stay further proceedings until the order is obeyed.
 - (6) Dismiss the action in whole or in part. But see Thomas S. Rhoades and Steven L. Schluneger, ENG BCA Nos. 6025, 6062, 6097, 95-1 BCA ¶ 28,215 (refusing to dismiss the appellants' appeal despite its failure to comply with various discovery requests because two of the three appeals were principally subcontractor claims, and the third appeal was a government claim).

- (7) Enter a default judgment against the disobedient party.
- (8) Hold the disobedient party in contempt of court.
- (9) Order the disobedient party—or the attorney advising that party—to pay the other party’s reasonable expenses, including attorney’s fees.

G. Expert Witnesses. FED. R. CIV. P. 26(b)(4).

- 1. A party may depose any person the other party has identified as an expert whose opinions that party may present at the trial.⁷
- 2. The party seeking the deposition is entitled to a copy of any written report the expert prepared pursuant to FRCP 26(a)(2) before the deposition begins.⁸
- 3. The party seeking the deposition must pay the expert a reasonable fee for the time the expert spent preparing for and attending the deposition unless a manifest injustice would result. See Copy Data Sys, Inc., ASBCA No. 44058, 98-1 BCA ¶ 29,390 (requiring the government to pay the appellant’s expert a reasonable expert witness fee as a “matter of basic fairness” because the government noticed the deposition to prepare for its own cross-examination of the witness)

⁷ A party may also depose experts that the other party does not intend to call as witnesses under certain “exceptional circumstances” (e.g., where the party seeking to depose the experts cannot obtain the facts known or the opinions held by the experts by other means). FED. R. CIV. P. 26(a)(4)(B). See FED. R. CIV. P. 35(b); cf. Donald C. Hubbs, Inc., DOT CBA Nos. 2012, 2013, 2014, 2015, 89-2 BCA ¶ 21,740 (requiring the appellant to give the government access to test results conducted by a non-testifying expert upon which a testifying expert relied, but declining to permit the government to actually depose the non-testifying expert).

⁸ FRCP 26(a)(2)(B) requires witnesses retained or employed to provide expert testimony to prepare and sign a written report that contains: (1) a complete statement of all of the witness’s opinions; (2) the basis and reasons for those opinions; (3) the data or other information the witness considered in forming those opinions; (4) any exhibits the witness plans to use to summarize or support those opinions; (5) the witness’s qualifications, including a list of all of the publications authored by the witness during the preceding 10 years; (6) the compensation the witness is receiving for the witness’s study and testimony; and (7) a list of any other cases in which the witnesses has testified during the preceding 4 years. FED. R. CIV. P. 26(a)(2)(B).

III. RULES FOR CONDUCTING DEPOSITIONS IN CASES BEFORE THE ARMED SERVICES BOARD OF CONTRACT APPEALS

A. General Policy and Protective Orders. ASBCA Rule 14(a).

1. The Board encourages the parties to engage in voluntary discovery procedures.
2. The Board may issue an order “to protect a party or person from annoyance, embarrassment, or undue burden or expense.”
 - a. The order may limit the scope, method, time, and place for discovery. See Meredith Relocation Corp., GSBCA Nos. 8956, 9124, 9295, 9844, 10077, 90-2 BCA ¶ 22,747 (refusing to grant the appellant’s motion for a blanket order permitting it to take depositions via videotape over the objection of the deponent).
 - b. The order may also include provisions for protecting the secrecy of confidential information or documents.

B. Timing. ASBCA Rules 14(b) and (c).

1. The parties may start taking depositions as soon as:
 - a. The Board docketed the appeal; and
 - b. One of the parties (normally the Appellant) files the complaint.
2. The parties will generally agree to a voluntary deposition schedule; however, either party may request the Board to order depositions and impose a schedule.⁹

⁹ The application for an order must specify whether the deposition is a discovery deposition or an evidentiary deposition. ASBCA Rule 14(b).

- a. The Board may order the deposition of “any person.”
 - b. The Board may order oral or written depositions.
- C. Use as Evidence. ASBCA Rule 14(d).
 - 1. The Board will not consider deposition testimony as evidence in a hearing until the testimony is offered and received.
 - a. As a general rule, the Board will not receive deposition testimony in a hearing if the witness is present and available to testify. See International Gunnery Range Services, Inc., ASBCA No. 34152, 90-1 BCA ¶ 22,601 (permitting the government to introduce the deposition testimony of a witness who had suffered a heart attack and was advised by his doctor not to testify at the hearing).
 - b. A party, however, may use a witness’s deposition testimony to contradict or impeach the witness’s hearing testimony.
 - 2. The Board may receive deposition testimony to supplement the record if the parties agree to submit the case on the written record pursuant to ASBCA Rule 11.
- D. Expenses. ASBCA Rule 14(e). Each party must bear its own expenses. See Duckels Constr. Co., AGBCA No. 89-1-218-1, 90-1 BCA ¶ 22,955 (requiring the government to pay all of the costs of a deposition it initiated, even though the appellant’s cross-examination allegedly consumed 61% of the total deposition time); Time Contractors, J.V., supra (refusing to allow the appellant to shift deposition costs to the government based on a “naked allegation of financial hardship”); cf. Copy Data Sys, Inc., supra (requiring the government to pay the appellant’s expert a reasonable expert witness fee as a “matter of basic fairness” because the government noticed the deposition to prepare for its own cross-examination of the witness).

E. Subpoenas. ASBCA Rule 14(f) and ASBCA Rule 21.

1. The Board expects the parties to cooperate by:
 - a. Making witnesses and evidence under their control available without the issuance of a subpoena; and
 - b. Securing the voluntary attendance of third-party witnesses.
2. Either party may request the Board to issue a subpoena pursuant to ASBCA Rule 21 if a subpoena is necessary to ensure the attendance of a witness at a deposition.
 - a. Administrative Requirements. ASBCA Rule 21(a) and (c).
 - (1) The party requesting the subpoena must do so in writing.
 - (2) The party requesting the subpoena must normally submit the request 15 days before the scheduled deposition date.¹⁰
 - (3) The party requesting the subpoena must state the reasonable scope and general relevance of the testimony or evidence sought.
 - b. Service. ASBCA Rule 21(f).
 - (1) The party requesting the subpoena must arrange for service.
 - (2) The subpoena may be served by:
 - (a) A U.S. marshal or deputy marshal; or

¹⁰ The Board may honor a “late” request for a subpoena. ASBCA Rule 21(c)(ii).

- (b) Any person who is:
 - (i) Not a party; and
 - (ii) More than 18 years of age.
 - (3) The person serving the subpoena must:
 - (a) Personally deliver a copy of the subpoena to the witness; and
 - (b) Tender the allowance and travel fees specified in 18 U.S.C. § 1821.¹¹
- c. Refusal to Obey a Subpoena. ASBCA Rule 21(g).
 - (1) The Board does not have any direct contempt power over a witness who fails to obey a subpoena.
 - (2) If a person refuses to comply with a subpoena, the Board may apply for an order requiring the person to appear and give testimony or produce evidence.¹²
 - (3) If the person refuses to comply with the order, the court that issued the order may punish the person for contempt.
- d. Requests to Quash or Modify a Subpoena. ASBCA Rule 21(d).
 - (1) A party may move to quash a subpoena within 10 days of service, but no later than the time specified in the subpoena for compliance.

¹¹ The government does not have to tender the allowance and travel fees in advance. ASBCA Rule 21(f)(2).

¹² The Board applies through the Attorney General to the United States District Court for the district where the person resides, is found, or transacts business. ASBCA Rule 21(g).

- (2) The Board may quash a subpoena for good cause (e.g., where the subpoena is unreasonable and/or oppressive). See W.G. Yates & Sons Constr. Co., ASBCA Nos. 49398, 49399, 98-1 BCA ¶ 29,655 (finding “no compelling argument” to grant a motion to quash a subpoena compelling the presence of the appellant’s “professional claims preparer” for a deposition); see also Truswal Sys. Corp. v. Hydro-Air Eng’g, Inc., 813 F.2d 1207 (Fed. Cir. 1987 (concluding that the district court abused its discretion when it quashed the plaintiff’s motion based solely on the plaintiff’s failure to cite case authority to support its discovery of sales information from a nonparty witness)).

F. Motions. ASBCA Rule 5(b). The Board may entertain and rule upon “appropriate motions.”

1. Motions to Compel. If you cannot resolve your dispute without judicial intervention, ask the Board to issue an order requiring the opposing party to respond by a specified date. See American Telephone & Telegraph Co., Federal Sys. Advanced Tech., DOT CBA No. 2479, 94-1 BCA ¶ 26,305 (granting the government’s motion to compel the testimony of a witness after the witness’s attorney inappropriately directed the witness not to answer the government’s questions); Tera Advanced Servs. Corp., GSBCA No. 6713-NRC, 84-1 BCA ¶ 16,936 (granting the government’s motion to compel the testimony of three witnesses despite the appellant’s claim of attorney-client privilege); cf. Nero & Assocs., Inc., GSBCA No. 6484-ED, 83-1 BCA ¶ 16,174 (noting that the government cannot refuse to permit the appellant to depose government witnesses based on its unilateral perception that the appellant provided evasive or incomplete answers to its interrogatories).

2. Motions for Sanctions. ASBCA Rule 35. Seek sanctions if the opposing party fails to comply with a discovery order. See Space Craft, Inc., ASBCA No. 47997, 96-2 BCA ¶ 28,485 (refusing to permit the appellant to present testimonial or documentary evidence during the hearing because the appellant refused to make its president available for a deposition); But cf. Taisei Rotec Corp., ASBCA No. 50669, 98-2 BCA ¶ 30,070 (refusing to grant the appellant's motion to dismiss absent a Board order requiring the government to produce documents, answer interrogatories, or make witnesses available); W.M. Schlosser Co., Inc., ASBCA No. 44778, 96-2 BCA ¶ 28,587 (stating that "[e]xclusion of evidence, such as expert witness testimony is a drastic action which generally should only occur when bad faith or willfulness in failing to comply with a court order is shown"); Praught Constr. Corp., ASBCA No. 46135, 96-1 BCA ¶ 28,058 (refusing to grant the appellant's motion for a default judgment absent a Board order requiring the government to produce documents or otherwise furnish discovery).

IV. CONDUCTING DEPOSITIONS.

A. The Ground Rules.

1. There are no generally accepted ground rules for conducting depositions.
2. Therefore, you should:
 - a. Review the ground rules on the record at the beginning of every deposition;
 - b. Make sure you know and understand the ground rules before the deposition begins; and
 - c. Make sure the appellant (and the appellant's attorney) knows and understands the ground rules before the deposition begins.

B. Taking Depositions.

1. Your goal is to expose biases and obtain admissions.
2. Prepare for a deposition like you would prepare for a hearing.
 - a. Decide the purpose of the deposition.
 - b. Do background research.
 - c. Decide who to depose and when to depose them.
 - d. Decide where to conduct the deposition.
 - e. Decide how to conduct the deposition (e.g., oral vs. written depositions; personal vs. telephonic depositions; etc.).
 - (1) Internet Deposition Services are available that give digital audio/video recording, with the ability to view real-time transcript and “chat” with others during the course of the deposition.
 - f. Decide whether to negotiate any stipulations.
 - (1) Negotiating stipulations in advance may avert conflicts and avoid delays during the deposition.
 - (2) The parties may to agree to take a deposition before any person, at any time, at any place, upon any notice, and in any manner. See FED. R. CIV. P. 29.
 - (3) Other common stipulations include:
 - (a) Reserving all objections except as to form;

- (b) Waiving the requirement to sign the transcript; and
 - (c) Permitting the deponent to sign the transcript before any notary.
 - g. Prepare a loose outline and “witness sheet.”
 - h. Organize your documents.
 - (1) The use of documents can make or break a deposition.
 - (2) Mark documents in advance, if possible.
 - (3) Ensure that you have an adequate number of clean, identical, and legible copies of each document you plan to use during the deposition.
 - i. Organize your deposition notebook.
 - (1) Your deposition notebook should contain a scripted opening, your outline, and copies of the documents/exhibits you plan to use during the deposition.
 - (2) Update your deposition notebook after each deposition.
 - j. If you anticipate problems, provide the Board with written notice of the deposition schedule and arrange to have a judge available to resolve any conflicts.
- 3. Examining the Witness.
 - a. Create a relaxed atmosphere.
 - (1) Be friendly and try to establish a rapport with the witness.

- (a) Maintain eye contact.
 - (b) Demonstrate your interest in what the witness is saying.
 - (c) Ask the witness to help you understand difficult concepts/terms.
- (2) Do not fight with opposing counsel.
- b. General Strategies/Techniques.
 - (1) Work from a loose outline.
 - (a) You should have a list of the topics you want to cover, but do not insist on covering them in any particular order.
 - (b) Let the witness dictate the order.
 - (2) Let the witness ramble.
 - (3) Allow a moment of silence after each answer. Some witnesses cannot stand silence and will fill the void by expanding their answers.
 - (4) Listen!!
 - (5) “Glossarize” by having the deponent define his own terms.
 - (6) Learn a deponent’s motivations in order to see if their acts are inconsistent with those motivations.
- c. Suggested Order/Pattern of Questioning.

- (1) Begin by asking the witness broad, open-ended questions that permit the witness to tell a story (e.g., who, what, where, when, how).
- (2) Follow-up with specific questions that commit the witness to a particular position or force an admission.
- (3) Wrap up with questions that pin the witness down.

d. Avoiding Late Recollections by the Witness.

- (1) Ask the witness about any documents the witness reviewed to prepare for the deposition.
- (2) Ask the witness about other things that might refresh the witness's memory.

e. Dealing with Obstreperous Opponents.

- (1) If your opposing counsel engages in objectionable behavior (e.g., angry outbursts, threatening gestures, continuous objections calculated to disrupt your examination, etc.):
 - (a) Describe what is your opposing counsel is doing on the record.
 - (b) Repeat the description as many times as necessary to compel your opposing counsel to discontinue the objectionable behavior.
 - (c) Consider taking a break to clear the air.
- (2) If your opposing counsel persists, make a motion to compel and/or a motion for sanctions.

f. Miscellaneous Tips.

- (1) Maintain control.
 - (a) Do not permit your opposing counsel to bully you out of a legitimate question.

- (b) Do not permit your opposing counsel's objections to distract you from gathering discoverable information. Note the objections for the record and continue.
 - (c) Do not explain your rationale for asking a particular question if you can avoid it.
 - (d) Do not forfeit legitimate areas of inquiry to be agreeable or accommodate the witness's or your opposing counsel's schedule. Postpone the deposition and finish it later, if necessary.
- (2) Stay on the record as much as possible.
 - (3) Remember that you are making a written record.
 - (a) Be careful with documents and gestures.
 - (b) Avoid showmanship and theatrics.

C. Defending Depositions.

- 1. You must fully defend the government's position at every deposition.
- 2. Your goal is should be to:
 - a. Protect the witness from your opponent's clever tricks; and
 - b. End the deposition as quickly as possible with as little useful information on the record as possible.

3. Prepare your witness in advance.
 - a. Make sure the witness is thoroughly familiar with the parties' claims and defenses.
 - b. Discuss the deposition process.
 - c. Teach the witness the "golden rules."
 - (1) Tell the truth.
 - (2) Think before you speak.
 - (3) Answer the question, but do not volunteer information.
 - (4) Listen carefully.
 - (5) Do not answer questions that you do not understand.
 - (6) Beware of tricky questions.
 - (7) Do not advocate the government's case.
 - (8) Do not guess or speculate.
 - (9) Examine documents and exhibits carefully and completely before you answer questions about them.
 - (10) Do not argue with the appellant's attorney.
 - (11) Correct mistakes as soon as possible.
 - d. Do a "dry run."

4. Protect your witness during the deposition.
 - a. Take regular breaks.
 - b. Make appropriate objections . . . BUT
 - (1) Do not coach the witness (See Hall v. Clifton Precision, 150 F.R.D. ¶525 (1993)); and
 - (2) Do not end the deposition (or direct the witness not to answer a question) unless you have no choice.
 - c. Move to limit or end the deposition pursuant to FRCP 30(d) if your opposing counsel is conducting the deposition:
 - (1) In bad faith; or
 - (2) In a manner intended to annoy, embarrass, or oppress the deponent.
5. Do not cross-examine your own witness unless:
 - a. You know the witness will not be available at the hearing;
 - b. There are matters on the record that require correction or clarification; or
 - c. A brief examination will resolve an important point in the government's favor.

V. LIMITS ON DISCOVERY.

A. Relevance. See FED. R. CIV. P. 26(b)(1).

1. For discovery purposes, information is “relevant” if it:
 - a. Concerns the subject matter of the appeal; or
 - b. Is reasonably likely to lead to the discovery of admissible evidence.
2. This is a very LOW standard.

B. Undue Burden. See FED. R. CIV. P. 26(b)(1).

1. The Board will weigh the requesting party’s need against the burden on the other party.
2. In so doing, the Board may consider:
 - a. The size and complexity of the appeal;
 - b. The amount in controversy;
 - c. The likelihood that the length of the hearing will be reduced, trial presentations simplified, or substantive settlement negotiations advanced; and
 - d. Any limitations on the parties’ resources.

- C. Attorney Work Product Rule. See FED. R. CIV. P. 26(b)(3). This privilege protects work done for a party in anticipation of litigation. See generally B.D. Click Co., Inc., ASBCA Nos. 25609, 25972, 83-1 BCA ¶ 16,328; Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 17717, 73-2 BCA ¶ 10,205. But see W.G. Yates & Sons Constr. Co., supra (finding no evidence to support the appellant's claim that the opinions of the appellant's "professional claims preparer" were covered by either the attorney-client privilege or the work product privilege).
- D. Attorney-Client Privilege. This privilege protects attorney-client communications undertaken for the purpose of seeking or giving legal advice. See generally B.D. Click Co., Inc., ASBCA Nos. 25609, 25972, 83-1 BCA ¶ 16,328; Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 17717, 73-2 BCA ¶ 10,205. But see Tera Advanced Servs. Corp., GSBCA No. 6713-NRC, 84-1 BCA ¶ 16,936 (granting the government's motion to compel the testimony of three witnesses despite the appellant's claim of attorney-client privilege).

VI. DISCOVERY EXPENSES.

- A. Funding Issues.
1. Discovery expenses are generally the responsibility of the contracting activity.
 2. Avoid making an unauthorized commitment of funds to purchase a deposition transcript.
 3. Plan for the travel expenses of non-government employees.
- B. Contracting Issues.
1. The contracting activity must contract for the services of a court reporter.
 2. Consider procurement lead-time and competition requirements when setting the deposition schedule.

3. Recognize the contractual implications of changing the deposition schedule—particularly at the last minute.

VII. EXPERT WITNESSES.

A. The Government's Expert Witness(es).

1. Involve the government's expert witness(es) in the deposition process.
2. Have the government's expert witness(es) prepare deposition questions.
3. Consider having a government expert present during depositions.

B. The Appellant's Expert Witness(es).

1. Discovering the Appellant's Expert Witness(es).
 - a. Use interrogatories to identify the appellant's expert witness(es) early in the discovery process. See FED. R. CIV. P. 26(b)(4)(B).
 - b. Ask the government's expert witness(es) what they know about the appellant's expert witness(es).
2. Deposing the Appellant's Expert Witness(es).
 - a. Your goal is to discover:
 - (1) The witness's credentials;
 - (2) How familiar the witness is with the case; and
 - (3) Potential bases for impeachment.

b. Possible Scenarios.

(1) The Worst Case Scenario—The Hired Gun.

- (a) Lock the witness into as many extreme positions as possible.
- (b) Attempt to lay a foundation for conflicts.

(2) The Best Case Scenario—The Painfully Honest Expert Witness.

- (a) Not all opposing witnesses are the enemy.
- (b) Nothing is more effective than proving your case with the appellant's expert witness(es).
 - (i) Determine whether the appellant's expert witness(es) bolsters the conclusions drawn by the government's expert witness(es).
 - (ii) Consider calling the appellant's expert witness(es) at the hearing if the appellant chooses not to base on the deposition testimony.

(3) The Generalist. Watch out for expert witnesses that have outstanding credentials, but no hands-on experience or familiarity with the critical facts of the case.

- (a) Challenge the foundations upon which the witness's conclusions are based.

- (b) Seek to establish that:
 - (i) The appellant (or the appellant's attorney) exerted undue influence over the witness.
 - (ii) The witness lacks personal knowledge.
 - (iii) The witness's source information is unreliable.
 - (iv) The witness had inadequate time to prepare.
 - (v) The witness's assumptions, methodology, or calculations are erroneous or flawed.
- c. Challenge expert witnesses who seek to testify about the ultimate legal issue in the appeal. See, e.g., Litton Sys. Inc., Applied Tech. Div., ASBCA No. 36976, 93-2 BCA ¶ 25,705; Lockheed Corp., ASBCA Nos. 36420, 37495, 39195, 91-2 BCA ¶ 23,903.
- d. Ask expert witnesses about their fees. See Cosmic Constr. Co., ASBCA Nos. 24014, 24036, 88-2 BCA ¶ 20,623 (indicating that the Board would "carefully scrutinize and evaluate" an expert's testimony where the expert was receiving a contingent fee for his testimony); Melville Energy Sys. Inc., ASBCA No. 33890, 87-3 BCA ¶ 19,992 (indicating that the Board would consider a contingent fee arrangement in evaluating an expert's credibility).
- e. Do not spend all of your time taking notes!!

VIII. CONCLUSION.